No. 20,131

In the United States Court of Appeals for the Ninth Circuit

SHATTUCK DENN MINING CORPORATION (IRON KING BRANCH), PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition to Review and Set Aside, and on Cross-Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

SOLOMON I. HIRSH,
MARION GRIFFIN,
Attorneys,

National Labor Relations Board.

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JURISDICTION

This case is before the Court on petition to review and set aside an order of the National Labor Relations Board, issued against petitioner on March 31, 1965, and on the Board's cross-petition for enforcement, pursuant to Section 10(e) and (f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*). The

Board's Decision and Order (R. 37-38, 31-32)[1] is reported at 151 NLRB No. 129. This Court has jurisdiction of the proceeding; the unfair labor practices occurred in Humboldt, Arizona, where petitioner is engaged in the business of mining and milling lead and zinc ores (R. 13-14; 5-6, 11). No jurisdictional issue is presented.

STATEMENT OF THE CASE

I. The Board's Findings of Fact and Conclusions of Law

The Board found that the Company violated Section 8(a)(3) and (1) of the Act by discharging employees Nick Olvera and Lupe Jaime to discourage union activity. The Board further found that the Company violated Section 8(a)(1) by threatening employees with reprisal if they engaged in strike action. Finally, the Board found that the Company violated Section 8(a)(3) and (1) by denying reinstatement to 19 unfair labor practice strikers upon their unconditional offers to return to work. The facts on which these findings are based are set forth below.

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[1] The original papers in the case have been reproduced and transmitted to the Court pursuant to its Rule 10(2). "R." refers to the formal documents bound as "Volume I, Pleadings"; "Tr." refers to the stenographic transcript of testimony at the unfair labor practice hearing. References designated "GCX" and "RX" are to exhibits of the General Counsel and petitioner (respondent before the Board), respectively. Whenever in a series of references a semicolon appears, references preceding the semicolon are to the Board's findings; those following, to the supporting evidence.

A. *Background: the Union is certified; employee Nick Olvera engages in union activities before and after the certification*

On April 2, 1964, Mine, Mill and Smelter Workers, Local Union No. 942 (referred to as the "Union" herein) was certified as the collective bargaining representative of the Company's employees following a Board-conducted election (R. 14; Tr. 13). For a period of more than 5 years preceding the Union's certification, a local of the United Steelworkers of America had served as the employees' collective bargaining representative (R. 14; Tr. 11, 65, 245). At the time of the events in issue here the collective bargaining agreement with the Steelworkers had been terminated and no new written agreement had been executed with the Union (R. 14; Tr. 250). The Company had orally agreed, however, that pending negotiation of a written agreement it would meet with the Union to process any grievances filed (R. 14; Tr. 50, 250-251).

Employee Nick Olvera was active in the campaign for the Union, soliciting signatures and introducing union organizers to the employees (Tr. 11-12, 87-88). A week after the Union was certified, it suppplied the Company with a list of temporary union officers, including Olvera, who was designated as vice-president, steward and member of the grievance committee (R. 14; Tr. 61, GCX8). During the next 2 weeks, the Union filed a variety of grievances with the Company involving such matters as mine safety and employee seniority (R. 17, 18, 24; Tr. 110-113, 252-255, GCX3, 4, 5). Olvera was active in the presentation and discussion of these grievances with company representatives (R. 14; Tr. 14, 31-34, 88-89, 172-174, 255).

B. *Supervisor Channon uses abusive language to Olvera on the job; Olvera files a grievance through the Union; and the Company discharges Olvera for alleged insubordination*

On April 21, 1964, employees Nick Olvera and Tony Portugal were working together on the swing shift under shift boss Derek Channon and night foreman Homer Edwards (R. 15; Tr. 14, 126). At their work station on the 2400 foot level they discovered a "missed" hole, *i.e.*, an unexploded powder charge that failed to go off because of defective wiring or a defective fuse (R. 15; Tr. 17-18, 100-101). After some preliminary cleaning of the site, Portugal and Olvera proceeded to the 2300 foot level to secure a new fuse for the charge (R. 15; Tr. 19, 100-101, 127). It was then approximately 6:20 p.m. (R. 15; Tr. 22, 72, 106, 150). Portugal and Olvera intended to return to the 2400 foot level with the fuse, finish cleaning up, set the fuse, bring their equipment up from that level, and set off the charge (R. 15; Tr. 22, 74, 102-103). The whole process would have taken approximately 30 or 35 minutes, which would have brought them to nearly 7:00 p.m.—an appropriate time for swing shift "lunch" (R. 15; Tr. 22, 103, 151, 155, 165-166, 170-171).[2] It was regarded as desirable to blast at this time because the dust and fumes from the explosion would have time to clear away during lunch and it would then be safe to return to work at that level, without any loss of time on the job (R. 15; Tr. 23, 102, 167-168).

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[2] Lunch on the swing shift is generally eaten sometime between 7:00 and 7:30 p.m. (R. 15, n. 3; Tr. 22, 70, 71, 151, 163, 167).

On their way to get the new fuse, Portugal and Olvera met shift boss Channon (R. 15; Tr. 20, 102). When Portugal explained that they had discovered a missed hole, Channon told him "to go ahead and blast it as soon as . . . [he] could" (R. 15; Tr. 127). Olvera, who was standing some feet away, called out "lunch time" (R. 15; Tr. 21, 72, 127-128, 133-134). Whereupon, Channon said to Portugal, "Wait a minute, Tony, Nick don't want to blast it" (R. 16; Tr. 23, 73, 128, 133-134, 152, 154). Turning to Olvera, Channon then indicated in obscene terms that he felt Olvera had been giving him a hard time, that he was in a position to return the favor with interest, and that he fully intended to do so at every future opportunity (R. 16; Tr. 21, 128, 154).[3] Portugal "took off" and went to get the fuse (R. 15; Tr. 128). Channon continued to talk to Olvera, ordering him first to go dig a ditch and then directing him instead to break up some large boulders that had collected on the "grizzly"—a kind of grate through which loose ore is sifted (R. 16; Tr. 21-22, 24, 105, 128, 154). Olvera, without argument, began work on the grizzly as directed (R. 16; Tr. 21, 23, 24, 105).

In the meantime, Portugal had met night foreman Edwards while getting the fuse and had told him of the missed hole without mentioning the exchange between Channon and Olvera (R. 16; Tr. 129). Edwards told Portugal that since it was already 6:20, he should go ahead and blast at lunch time (R. 16; Tr.

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[3] Channon had been a supervisor only 2½ months (R. 22, 23; Tr. 267-268).

129-130). When Portugal returned with the fuse, he found Olvera working on the grizzly (R. 16; Tr. 130). He asked Olvera to go back down to the 2300 foot level with him to set the blast (R. 16; Tr. 130). Olvera answered that he couldn't because he was under orders from Channon to continue the job he was on (R. 16; Tr. 130-131). Since Portugal could not do the blasting by himself, he joined Olvera at work on the grizzly (R. 16; Tr. 24, 131). When Channon reappeared nearly an hour later, Portugal asked if he would send Olvera to help with the blast (R. 16; Tr. 132-133). Channon agreed and directed Olvera to go with Portugal (R. 16; Tr. 132-133). It was then after 7:00 and by the time preparations were completed and the blast set off it was approximately 7:45 or 7:50 (R. 16; Tr. 25, 107).[4] Channon made no further mention of the incident that day or in the week following and none of the other supervisory personnel reprimanded Olvera on the subject (R. 16; Tr. 45, 113, 116).

On April 22, 1964, the day after the Channon-Olvera incident, a scheduled meeting took place between company representatives and the union grievance committee on a variety of mine-safety problems (R.

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[4] Portugal and Olvera ate lunch after the blast at a time later than normal (R. 16, n. 6; Tr. 107-108). It seems clear from the record that it was standard procedure for miners to clean and blast any missed hole they found without special orders from a foreman. Thus, had Portugal and Olvera not met Channon, they would presumably have gone ahead and set the blast off at approximately 7:00 p.m. as they had originally intended (R. 15, n. 4).

17; Tr. 27-28, 172-175, GCX 3, 4). The ranking company representative was General Manager Dan Kentro; the ranking union representative, temporary President Don Covey (R. 17; Tr. 32). Vice-President Nick Olvera was also present and took a very active part in the discussion (R. 17; Tr. 31-34, 173). At the close of the meeting President Covey presented to management a grievance filed by Olvera against Channon (R. 17; Tr. 35, 175, 257). The grievance was signed by all members of the grievance committee as well as by Olvera and Portugal (R. 17; GCX 2). It stated:

> The foreman using abusive language and threatening complainant, an officer and steward of local union, union requests that this foreman be reprimanded and this practice stopped immediately.

The next grievance meeting was held on April 28, 1964 (R. 18; Tr. 35, 37-38, 134, 176, 260). As the meeting opened, Manager Kentro remarked that the Union was "turning in too many grievances, small grievances that didn't amount to much . . . and he didn't like it" (R. 18; Tr. 136). Following a brief discussion of a grievance concerning seniority, the parties turned to consideration of Olvera's abusive language grievance (R. 18; Tr. 38-40, 135-137, 176-177, 261). Kentro led off with a statement about the functions and authority of shift bosses, after which he turned to Olvera and said, "Nick, this looks pretty serious" (Tr. 41, 117, 261). Olvera answered, "Yes, it does" (Tr. 117), and Kentro rejoined, "[N]ot for

us, for you" (Tr. 41, 117). Kentro then stated that although he did not condone the use of abusive language generally, he felt that in this particular instance Channon's language might have been justified because it appeared to him that Olvera had been insubordinate and had interfered with the carrying out of an order (R. 18; Tr. 261-262). He further stated that he regarded disobedience of an order as a serious breach of discipline and that there would be possible grounds for Olvera's discharge if he concluded that the incident had in fact taken place in the manner in which it had been reported to him (R. 18; Tr. 41, 179, 262).

Kentro then called upon Olvera and Portugal to give their versions of the incident and they recounted the facts set forth above (R. 18; Tr. 41-44, 118, 138-139, 156). Channon, who was present at the meeting, disputed this account in only one material respect; he asserted that in response to his direction to blast as soon as possible, Olvera had called out "No, no, lunch time," rather than simply "lunch time," as Portugal and Olvera contended (R. 18; Tr. 45, 121, 262-263). Portugal and Olvera insisted that Olvera had not said "no, no," [5] and undertook to point out that it was unreasonable for Channon to have construed Olvera's response as a defiance of his order when, almost simultaneously with this alleged insubordination, Olvera had promptly acceded to Chan-

[5] Channon did not testify at the unfair labor practice hearing; the testimony of Portugal and Olvera on this point stands uncontradicted in the record (R. 16, n. 7, 17; Tr. 21, 45, 133-134, 151-152).

non's order to work on the ditch or the grizzly (R. 18; Tr. 45, 46, 151-152, 179, 264). Channon did not contend that he had repeated the order to blast or made any attempt to find out what Olvera's response meant before berating him and directing that he undertake the other work (R. 18; Tr. 43, 121). The meeting closed with a statement by Kentro that he would sleep on the matter and, if he decided that Olvera's conduct had in fact been insubordinate, he would have his discharge slip made out in the morning (R. 18; Tr. 41, 138, 179, 266).

The next day, April 29, Olvera was handed a discharge slip, dated April 28, and signed by Kentro, which read as follows (R. 18; Tr. 47-48, GCX 6):

> Discharged for refusing to obey an order at or about 6 p.m. on April 21, 1964, by his supervisor Mr. Derek Channon and interfering with an order given to Mr. Tony Portugal by Mr. Portugal's supervisor, Mr. Derek Channon at the same time noted above.

C. *Olvera files a grievance on his discharge; the Company posts a notice threatening to discharge employees if they engage in strike action; and the employees strike to protest Olvera's discharge*

Following his discharge on Wednesday, April 29, 1964, Olvera went to the Union's office and consulted with other union officials (R. 19; Tr. 49-50, 181). Together they prepared a written grievance protesting Olvera's discharge and requesting his reinstatement with full back pay and all rights restored (R. 19; Tr. 49-50, 181-182, 272, GCX 7). A meeting was sched-

uled on this grievance for the following Monday, May 4 (R. 19; Tr. 51, 184-185, 273).

On Friday, May 1, the Company posted on its bulletin board a notice to all employees, signed by Manager Kentro, which read as follows (R. 19; Tr. 62, 275, GCX 9): [6]

> This notice to all employees at this operation is being made because of rumors which have come to our attention that there may be an *attempt by some employees to stop the operation of the Iron King Mine in the near future.* The Company wishes to state that *operation* and *production* will continue at the Iron King. In order to avoid any misunderstanding, the Company hereby *notifies you* that each employee is expected to report for work at his regulraly scheduled work shift time, unless he has an excused absence permit signed or approved by both his Department Head and the General Manager. Employees *failing to report for work will be considered as having quit* and will be dropped from the payroll, unless they have obtained the excused absence permit referred to above. [Emphasis as it appears in the original.]

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[6] At the unfair labor practice hearing, Kentro testified that this notice was posted because following the Union's certification as bargaining representative rumors had circulated that a strike might ensue (R. 19; Tr. 275-276). According to Kentro, the Company wanted to make it perfectly clear that it intended to continue operations in the event of a strike and wanted to remind employees of its long established policy concerning unexcused absences (R. 19; Tr. 276). The provisions of the notice, however, are actually more stringent in several particulars than the Company's "rules governing excused and unexcused absences" (R. 19, n. 9; RX 7).

On Sunday, May 3, approximately 80 employees attended a special union meeting to consider what action to take on Olvera's discharge (R. 19; Tr. 52, 141-142, 183). Following a lengthy discussion of the circumstances of the discharge, the employees voted unanimously to call a protest strike if the grievance was not satisfactorily adjusted the next day (R. 20; Tr. 52, 141-142, 183-184).

On Monday, May 4, the scheduled meeting between union and company representatives on the discharge grievance took place (R. 20; Tr. 52, 185). Olvera and Portugal repeated their statements on the April 21 incident in substantially the form recited above, *supra,* p. 5 (R. 20; Tr. 186-187). Manager Kentro would not permit union representatives to question shift boss Channon on his version of the episode (R. 20; Tr. 54, 186, 274). After listening to the evidence presented, Kentro said he "had not heard anything . . . that would tend to change [his] mind regarding this discharge" and that he was standing by his decision (R. 20; Tr. 187, 274). The chairman of the grievance committee replied that in that case, they would "have to settle this on the picket line," and the meeting concluded (R. 20; Tr. 274-275, 145, 187, 293).

The following morning, Tuesday, May 5, pickets appeared in front of the mine bearing signs that stated generally, "Local 942, on strike, Unfair" (R. 20; Tr. 54, 188). A majority of the approximately 200 employees then working refused to cross the picket line (R. 20; Tr. 206). Manager Kentro immediately made announcements on the radio and was quoted in

the newspapers as saying that the mine would continue to operate, that he considered those on strike as having quit, and that he was looking for replacements (R. 20; Tr. 280-281, 282-283, 296-299, RX 9, 11).

On Thursday, May 7, the Company sent letters to the strikers stating that since they had failed to report for a scheduled work shift it was enclosing their paychecks for the preceding week. The letters further stated that production at the mine was continuing and that the Company was undertaking to replace the strikers, but that those reporting before replacements had been secured would be reinstated without prejudice. Finally, the letters stated that the strikers had become ineligible to receive benefits under the Company's group hospitalization, disability, and medical care policy since they had removed themselves from actively employed status (R. 20; Tr. 280, RX 8).

On Friday, May 8, the Union filed an unfair labor practice charge against the Company alleging that Olvera's discharge had been motivated by antiunion considerations, in violation of Section 8(a)(3) and (1) of the Act (Tr. 81, GCX 1(a)).

D. *Employee Lupe Jaime warns a fellow employee about the possible consequences of not joining the strike and the Company discharges Jaime for alleged strike misconduct*

Employee Lupe Jaime joined the strike on Tuesday, May 5, 1964, and thereafter participated in picketing at the mine (R. 21; Tr. 217). Jaime was a long-time

friend of Ernie Rivera, a non-striker (R. 21; Tr. 224). On Saturday, May 9, Jaime drove to Rivera's home (R. 21; Tr. 222). Rivera came out of the house to meet Jaime and stood at the door of his car discussing the strike situation with him through the window on the driver's side (Tr. 222, 237-238). Rivera's wife remained inside the house, at the door, listening to their conversation (Tr. 315-316).

Jaime, referring to Rivera's refusal to join the strike, asked, "How come you didn't stick by us, Ernie?" (R. 21; Tr. 222, 315, 323). Rivera answered that he had a family to support and bills to pay (R. 21; Tr. 223). Jaime rejoined that "everybody has got bills to pay," but Rivera replied, "[W]ell, I just can't do it" (Tr. 223, 323). Jaime said, "[Y]ou've got a lot of friends that probably won't want to speak to you after this, nobody will want to drink with you, eat lunch with you, or anything like that" (Tr. 223, 315, 325). When Rivera answered that he didn't care, Jaime continued, "[Y]ou will probably go downtown and be drinking, run into some of the fellows drinking and they will probably threaten you, want to fight you, might call you names" (R. 21; Tr. 223, 315, 319-320, 323-324). But Rivera still said, "I don't care, let them" (R. 21; Tr. 223), Jaime replied, "O.K.," and asked Rivera what he was doing on the job (Tr. 223). Rivera answered that they were all working on the grizzly "pulling muck" and "scraping the rocks" (Tr. 223). Jaime then said goodbye and the two men parted amicably (R. 21; Tr. 223).

Shortly thereafter, Mrs. Rivera telephoned the Company to report that Rivera had the flu and would

not be in to work that day (R. 21; Tr. 316). In the course of the call, Mrs. Rivera reported Jaime's visit and his conversation with her husband (R. 21; Tr. 316). This report was later relayed to Manager Kentro who immediately drove to the Riveras' house and offered to assist them in instituting police action against Jaime (R. 21; Tr. 302, 316-317, 326). Rivera refused the offer, stating that Jaime was a good friend (R. 21; Tr. 302, 317, 326). The following Monday, May 11, 1964, Kentro wrote Jaime a letter discharging him for "unlawful conduct during a strike" (R. 21; Tr. 303, 218-219, GCX 10).

E. *The Union calls an end to the strike and the Company denies reinstatement to 19 of the strikers on the ground that they have been replaced*

On Monday, May 11, 1964, company and union representatives met with a federal conciliator in an effort to settle the strike (R. 20; Tr. 54, 189, 289). The conciliator attempted to get the parties to submit the merits of Olvera's discharge to arbitration (R. 20; Tr. 54-55, 85, 189-190). The Union agreed to this proposal, but the Company rejected it, and the meeting closed without any resolution of the strike issue (R. 20; Tr. 54-55, 189-190, 289-290, 294).

Shortly thereafter, union officials met with the employees to decide whether to continue the strike (R. 20; Tr. 56, 191). After some discussion, they agreed that since the Company was hiring replacements it would be advisable to call off the strike and to handle Olvera's case by processing the charges already filed with the Board (R. 20; Tr. 56, 190-191). On Tues-

day morning, May 12, 1964, the strikers reported back to work (R. 20; Tr. 56, 190-191, 284). The Company reinstated the bulk of the strikers, but denied reinstatement to 19 on the ground that replacements had been hired to fill their jobs (R. 20; Tr. 284-288).

On these facts, the Board concluded that the Company violated Section 8(a)(3) and (1) of the Act by discharging employee Nick Olvera to discourage the Union's continued filing of grievances and its aggressive pursuit of bargaining (R. 26, 37). The Board further found that the Company violated Section 8(a)(1) by posting its notice of May 1, 1964, threatening employees with reprisal if they engaged in strike action (R. 26-27, 37). Finally, the Board found that the Company violated Section 8(a)(3) and (1) of the Act by discharging employee Lupe Jaime for engaging in protected strike activity (R. 28-29, 37) and by denying reinstatement to 19 of the strikers who struck to protest Olvera's unlawful discharge (R. 27-28, 37).

II. The Board's Order

The Board's order directs the Company to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act (R. 31). Affirmatively, the Board's order directs the Company to offer immediate and full reinstatement to Olvera and Jaime and to all strikers previously denied reinstatement on the ground that they had been

replaced; to make these employees whole for any loss of pay suffered by reason of the discrimination against them; and to post appropriate notices (R. 31-32).

SUMMARY OF ARGUMENT

Following certification on April 2, 1964, the Union entered on its duties as bargaining representative in a vigorous and aggressive manner. Rumors were circulated that strike action was imminent and within the first 3 weeks of its certification the Union had filed five grievances covering a number of specific complaints. Most of these complaints, which related to mine-safety conditions, were successfully resolved to the Union's satisfaction. But by the fourth week of the certification, the Company had apparently determined to take a firm stand against the Union. Thus, at the opening of the grievance meeting of April 28, Manager Kentro stated that the Union was "turning in too many grievances, small grievances that didn't amount to much . . . and he didn't like it." Kentro then not only defended shift boss Channon against the abusive language grievance filed by the Union's acting vice-president, Nick Olvera, but threatened that Olvera might be discharged for "insubordination."

The misconduct of Olvera that supposedly warranted his discharge and Channon's use of obscenity in reply, consisting of calling out "lunch time" when Channon told Olvera's partner to "go ahead and blast" an unexploded powder charge as soon as he

could. In fact, the necessary preparations would have taken until approximately lunch time in any event and blasting at this time was consistent with recognized safety and efficiency practices at the mine. Moreover, Channon himself had never suggested that Olvera's conduct might warrant discharge and Olvera had continued to work under his direction and to obey orders without further reprimand for a week following the incident. Nonetheless, Manager Kentro discharged Olvera on the day following the meeting on his abusive language grievance, allegedly for "refusing to obey" and "interfering with" a supervisor's order.

Two days later, in response to the strike rumors that had circulated since the Union's certification, the Company posted a notice warning that employees failing to report for work would be "*considered as having quit*" and would be "dropped from the payroll" unless they had excused absence permits approved by the Department Head and the General Manager.

At a meeting called the following Monday to consider a grievance filed by Olvera on his discharge, Manager Kentro refused to permit union representatives to question shift boss Channon and reaffirmed his decision to discharge Olvera. The next day, a majority of the employees went on strike to protest Olvera's discharge. In the course of the strike, the Company discharged employee Lupe Jaime for seeking to persuade a long-time friend to join the strike and telling him, among other things, that some of the strikers might ostracize or fight him if he did not join them. When the strike ended, the Company denied

reinstatement to 19 of the strikers on the ground that they had been replaced.

Substantial evidence on this record supports the Board's finding that the Company discharged Olvera to discourage the Union's continued filing of grievances and its aggressive pursuit of bargaining. Contrary to petitioner, the Board, through its Trial Examiner, did not attempt "to act as an arbitrator and substitute [its] judgment for management's as to proper discipline" (Br. 10-11). Rather, the Board considered the insubstantiality of the grounds for discharge offered by petitioner as a factor in determining the real motive for its action. On the basis of the entire record, including the evidence affirmatively linking Olvera's discharge with the grievance proceeding he had initiated, the Board concluded that Olvera was in fact discharged, not for the reasons given, but as a warning to the Union, its officers, and adherents of the dangers involved in the vigorous processing of grievances and the aggressive pursuit of bargaining.

In addition, the Board properly concluded that the Company's posted notice constituted a threat to discharge employees for engaging in strike action and thus tended to interfere with, restrain, and coerce them in the exercise of their statutory rights. Substantial evidence supports the Board's further finding that striking employee Lupe Jaime did not engage in threats or other misconduct that would remove his attempt to elicit strike support from the protections of the Act or justify the Company's discharge of him for

"strike misconduct." Finally, the Board properly held that the employees who struck to protest Olvera's discharge are unfair labor practice strikers, entitled to reinstatement with back pay from the date of their unconditional offers to return to work.

ARGUMENT

I. Substantial Evidence Supports the Board's Finding That the Company Violated Section 8(a)(3) and (1) of the Act by Discharging Employee Nick Olvera to Discourage the Union's Continued Filing of Grievances and Its Aggressive Pursuit of Bargaining

Olvera was employed by the Company for 9 years prior to his discharge, without ever receiving a serious reprimand on his work (R. 22; Tr. 10, 57-59). He participated in the Union's organizational drive and following its certification on April 2, 1964, was elected temporary vice-president and member of the grievance committee, *supra*, p. 3.[7] In the next few weeks Olvera acted as one of the Union's chief spokesmen at grievance meetings with the Company in presenting and securing successful resolution of a number of complaints relating to mine safety conditions (R. 14; Tr. 31-34, 38-39, 172-175, GCX 3, 4, RX 5). At the close of one such meeting on April 22, 1964, the Union presented to the Company a grievance filed by Olvera against shift boss Channon for using abusive language to him on the job (R. 17; Tr. 35, 175, 257, GCX 2). This grievance came up

[7] On April 9, 1964, the Union gave the Company notice of the election of its temporary officers and stewards, including Olvera (R. 14; Tr. 61, GCX 8).

for discussion at the next meeting of the parties on April 28, 1964 (R. 18; Tr. 37-40, 134-137, 176-177, 260-261). Manager Kentro opened this meeting by expressing disapproval of the number and kind of grievances the Union had been filing [8] and closed the meeting by warning that Olvera might be discharged for "insubordination" (R. 18; Tr. 41, 136, 138, 179, 266). Although Kentro indicated that he would "sleep on" the matter, the discharge slip handed Olvera the next morning was dated the same day as the grievance meeting (R. 18; Tr. 41, 47-48, 138, 179, 266, GCX 6).

The record thus provides affirmative support for the Board's finding that the Company discharged Olvera in immediate response to his filing of a grievance against a supervisor and in retaliation for his earlier prosecution of complaints as acting union vice-presi-

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[8] The challenge urged by the Company (Br. 18) to the Board's finding of fact that Kentro made this statement criticizing the Union for its filing of grievances is without merit. Manager Kentro did not deny the credited testimony of employee Tony Portugal that such a statement was made (R. 18, n. 8). Contrary to the Company's contention, Portugal's obviously inadvertent misstatement of the length of time shift boss Channon had been employed as a supervisor—a fact not in issue here—would not warrant overruling the Board's crediting of his undenied testimony on what occurred at the grievance meeting of April 28, which he attended and took part in. It is well settled that such findings of fact, and the credibility determinations on which they are based, are properly for the Board and its trial examiners. See, *Bon Hennings Logging Co.* v. *N.L.R.B.*, 308 F. 2d 548, 554 (C.A. 9); *N.L.R.B.* v. *Davisson*, 221 F. 2d 802, 803 (C.A. 9); *N.L.R.B.* v. *San Diego Gas & Electric Co.*, 205 F. 2d 471, 475 (C.A. 9).

dent and member of the grievance committee. Although the Company was free to resist the demands of the newly-certified Union on their merits, it could not, under Section 8(a)(3) and (1) of the Act, combat these demands indirectly by discharging "one of the more forcible union adherents . . . as a warning to the Union to take it easy, and at the same time challenge and weaken it" (R. 25).

The Company seeks to defend the discharge of Olvera by alleging that it grew out of his grievance against Channon only in the sense that investigation of the grievance brought to light facts warranting his discharge (Br. 17-18). Thus, the Company contends that the immediate cause of Olvera's discharge was his insubordination to shift boss Channon—or, at least, management's belief that he had been insubordinate to Channon. As the Board found, however, the record fails to support either Olvera's actual insubordination or the Company's good faith belief in his alleged insubordination (R. 22-24).

According to Manager Kentro, following the filing of Olvera's abusive language grievance on April 22, 1964, he called in Mine Superintendent Sundeen and asked him to investigate the matter and report back to him (R. 17; Tr. 257-259). Although Sundeen and Channon, himself, submitted written reports to Kentro that allegedly led Kentro to believe in Olvera's insubordination, the Company neither offered these reports in evidence at the unfair labor practice hearing nor called Sundeen or Channon to testify as witnesses (R. 16; n. 7, 17; Tr. 258, 267, 292, 305-306, Co. Br.

4).[9] Moreover, assuming *arguenda* that these reports led Manager Kentro to believe initially that Olvera was guilty of insubordination, the subsequent grievance meeting of April 28 made clear that the incident between Channon and Olvera represented at most a personal misunderstanding and that no defiance of orders was intended. Thus, it was demonstrated that Channon had directed Portugal to blast the missed hole as soon as he could and that Olvera had simply called out "lunch time," which was, in fact, entirely consistent with the instruction to blast as soon as possible, and which also accorded with sound mining practice.[10] It was further brought out

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[9] At the grievance meeting of May 4 on Olvera's discharge, Manager Kentro refused to permit union representatives to question Channon, *supra*, p. 11.

[10] Even assuming that Manager Kentro felt justified in crediting Channon's statement that Olvera had also said "no, no," and in discrediting the statements of Portugal and Olvera to the contrary, this interjection could not reasonably be interpreted as an expression of defiance and insubordination, under all the circumstances presented here, including Olvera's ready obedience to Channon's subsequent direct commands (R. 23-24). Moreover, Channon himself never suggested that Olvera had done anything warranting discharge; on the contrary, even at the height of his irritation, he assumed that Olvera would continue on the job and threatened to give him a hard time in the future (R. 22, 23; Tr. 21, 45, 292). The Company seeks to explain Channon's failure to report the incident or to recommend Olvera's discharge on the ground that Channon was inexperienced as a supervisor (Br. 18). On this record, as the Board noted, it seems more likely that Channon's inexperience and insecurity on the job led to his initial outburst, and that after calming down, he too concluded that Olvera had not intended any defiance of his or-

at the meeting that despite Channon's burst of obscenity in response, Olvera had been ready without argument to obey his first direction to go dig "some ditch" and his subsequent order to work on the grizzly (R. 16; Tr. 21, 23). Finally, it was made clear that Channon had not sought any explanation of Olvera's meaning nor repeated his direction to blast as soon as possible before berating Olvera and directing him to other work (R. 22, 23-24; Tr. 23-24, 307). Manager Kentro testified at the unfair labor practice hearing on his own awareness that no direct order to blast had been given Olvera (Tr. 309-310). Thus, he stated (Tr. 308):

> Mr. Channon was a green supervisor, a new supervisor; an older supervisor would have made a direct order at that point and would have made it clear that he wanted the hole fired to Mr. Olvera.

In marked contrast to his decision that Olvera's conduct in these circumstances warranted discharge, Manager Kentro testified to the attitude he had taken in an earlier case of alleged insubordination. In that instance, the employee had been discharged by his immediate supervisor; but Manager Kentro concluded, after investigation, that "there was a possibility" the employee "had not clearly understood" his supervisor, and he accordingly changed the discharge to a

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ders in suggesting that the blasting be done at lunch time (R. 22, 23). In this connection, it may be noted that night foreman Homer Edwards had independently directed Portugal to do the blasting at lunch (R. 16; Tr. 129-130).

10-day layoff (Tr. 290). Similar contrasts are presented in the record between the Company's generally lenient disciplinary policy and its asserted conviction that the behavior of Olvera in the instant case warranted no punishment less severe than discharge (R. 25; Tr. 59-60, 146-147, 191, 290-291).

Contrary to the Company (Br. 20), there is no impropriety in looking to the apparent senselessness of the harsh penalty attached to Olvera's conduct here in judging the good faith of the Company's representations as to its motive; for "[i]t is well settled that the inferences drawn by the Board are strengthened by the fact that the explanation of the discharge offered . . . fails to stand under scrutiny." *N.L.R.B.* v. *Dant & Russell*, 207 F. 2d 165, 167 (C.A. 9). See also, *N.L.R.B.* v. *Homedale Tractor & Equipment Co.*, 211 F. 2d 309, 314 (C.A. 9), cert. denied, 348 U.S. 833; *N.L.R.B.* v. *Sebastopol Apple Growers Union* 269 F. 2d 705, 710 (C.A. 9); *N.L.R.B.* v. *Griggs Equipment, Inc.*, 307 F. 2d 275, 278 (C.A. 5). Moreover, Kentro's decision to discharge Olvera despite his knowledge that there might be "some trouble" because these things are "not taken lightly by anybody," his adherence to the decision in the face of a strike, and his refusal to go to arbitration on the matter, all support the view that to the Company, Olvera's discharge represented round one in a fight to test "the determination of the newly chosen bargaining representative to stand up against management resistance" (R. 25).[11] And this view is further borne out by sub-

[11] See the undenied testimony of Union President Covey that when he presented the grievance protesting Olvera's

sequent company actions also found to constitute unfair labor practices.

II. The Board Properly Found That the Company Violated Section 8(a)(1) of the Act by Posting a Notice Threatening Employees With Discharge for Engaging in Strike Action

Two days after Olvera's discharge, the Company posted a notice stating, *inter alia*, that "rumors . . . have come to our attention that there may be an *attempt by some employees to stop the operation of the Iron King Mine in the near future*" and warning that "[e]mployees *failing to report for work will be considered as having quit* and will be dropped from the payroll, unless they have obtained [an] excused absence permit [approved by the Department Head and the General Manager]" (R. 19; GCX 9).

It is well settled that an employer violates the Act if he discharges employees for going on strike or

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discharge to Manager Kentro, Kentro stated, "[N]ow, the game is over, I think we understand each other" (Tr. 182). Contrary to the Company's contention (Br. 23-25), no adverse inference may be drawn from the Union's initial effort to secure reinstatement for Olvera through normal bargaining processes and its deferral of unfair labor practice charges until May 8, 9 days after the discharge (R. 25, GCX1(a)). Obviously, it is preferable, if possible, to secure an immediate and amicable settlement through private channels rather than to pursue the more involved and time-consuming course of a public remedy. In any event, judgment of the Company's motive must be based on the record developed at the unfair labor practice hearing; it does not depend on the immediate reaction of union officials. As the Trial Examiner noted, "The issue is not what the Union representatives said or did at the time, but what can reasonably be said to have in fact motivated Respondent's action" (R. 25).

threatens them with discharge by asserting that all who fail to report for work will be treated as having resigned. *N.L.R.B.* v. *West Coast Casket Co., Inc.*, 205 F. 2d 902 (C.A. 9); *N.L.R.B.* v. *McCatron*, 216 F. 2d 212, 215 (C.A. 9), cert. denied, 348 U.S. 943; *N.L.R.B.* v. *Globe Wireless Co.*, 193 F. 2d 748, 750 (C.A. 9), and cases there cited; *N.L.R.B.* v. *U.S. Cold Storage*, 203 F. 2d 924, 927 (C.A. 5), and cases there cited, cert. denied, 346 U.S. 818. That the Company made such a threat here is indisputable on this record. Both the language of the notice itself and the testimony of Manager Kentro belie the Company's contention that the notice was intended merely as a restatement of long-standing company policy on unexcused absences (Br. 27).[12] Thus, Kentro admitted that the notice was posted in response to strike rumors that had circulated since the Union's certification as bargaining representative and the terms of the notice demonstrate that it was designed to combat anticipated strike action (R. 19, 26-27; Tr. 275-276, GCX 9). Equaly without support is the Company's assertion that the notice was directed only at unprotected and perhaps unauthorized work stoppages by a "few employees" (Br. 27). Nothing in the notice or the surrounding circumstances at the mine would have

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[12] As noted, *supra*, p. 10, n. 8, the Company's general rules relating to unexcused absences were, in fact, less stringent than the terms of the posted notice. Moreover, the Company's rules could not, in any event, justify a threat to discharge employees for engaging in strike action. Cf. *N.L.R.B.* v. *Washington Aluminum Co.*, 370 U.S. 9, 16-17.

conveyed such a limitation on the Company's threat to the employees and the strike that was, in fact, called was fully authorized and protected.

The Company further contends that even if the notice might reasonably have been construed as a threat to discharge strikers when first posted, this threat was cured by the Company's subsequent announcement and letters stating that strikers would be reinstated on application if their jobs had not yet been filled by replacements (Br. 27). Clearly, however, these reassurances, which came after the strike's inception, could not retroactively dissipate the effect of the notice in dissuading employees from joining the strike in the first place.[13] Thus, the reasonable tendency of the Company's notice of May 1 was to undercut the strike at its inception on May 5 and

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[13] Moreover, the tone of the letter to the strikers was not as reassuring as the Company would suggest. Thus, each striker received a letter signed by General Manager Kentro, which began, "Dear Mr. ——: We note that you did not report for work on your scheduled work shift May 5, 1964, and for that reason, we are enclosing a paycheck for the period April 26, 1964 through May 4, 1964." Although the letter promised that if "you report for work before a replacement is hired, you will be reinstated without loss of seniority," it warned that "because you have failed to report for work a replacement will be hired for your job," and concluded, "By failing to report for work on May 5, 1964, you removed yourself from the actively employed status . . . and you have, therefore, become ineligible to receive benefits" under the Company's group hospitalization, disability, and medical care policy (R. 20; RX 8). A letter phrased in these terms, far from curing the Company's original threat to discharge strikers, might even reinforce it in the minds of men, unversed in the law, whose jobs were at stake.

to be instrumental in the Union's ultimate capitulation on May 12. And it is, of course, the reasonable tendency of such threats to inhibit protected concerted activity that is the test of their legality and not, as the Company suggests (Br. 27), their virtually unprovable actual effect. *N.L.R.B.* v. *Ford*, 170 F. 2d 735, 738 (C.A. 6), and cases there cited; *Joy Silk Mills* v. *N.L.R.B.*, 185 F. 2d 732, 743-744 (C.A.D.C.), cert. denied, 341 U.S. 914.

III. Substantial Evidence Supports the Board's Finding That the Company Violated Section 8(a)(3) and (1) of the Act by Discharging Employee Lupe Jaime for Alleged Strike Misconduct

On May 9, 1964, the Company admittedly discharged striking employee Lupe Jaime for his conduct in attempting to persuade a long-time friend and fellow employee, Ernie Rivera, to join the strike. The Company seeks to defend its action on the ground that Jaime threatened Rivera in order to attain his objective and thus removed his activity from the protection of the Act. This contention, however, is refuted by the record evidence. Thus, the Company's own witnesses, the Riveras, testified that Jaime's visit was an amicable one and that he spoke as a friend of long-standing in attempting to persuade Rivera to join in the strike (R. 28; Tr. 318-319, 320, 327-328). Although Jaime indicated his belief that some of the strikers would ostracize and might try to fight Rivera if he refused to join them, he made no suggestion that he himself would have anything to do with this conduct; nor did he make a

personal threat of any kind (R. 28; Tr. 223-225, 315-316, 323-324).[14] Neither of the Riveras regarded Jaime's statement as a threat of personal retaliation or instigation of others to retaliate (R. 28; Tr. 319-320, 327-328).

Under these circumstances, as the Board noted, Kentro's immediate visit to the Riveras on hearing of the incident; his offer to have Jaime arrested, which Rivera rejected; and his summary discharge of Jaime form a pattern reminiscent of that followed in Olvera's case and provide support for the conclusion that Kentro used the alleged threat as a pretext to retaliate against Jaime for protected strike activity, in violation of Section 8(a)(3) and (1) of the Act (R. 28). Moreover, assuming *arguendo* that Kentro had a good faith belief that Jaime had engaged in strike misconduct, this belief could not provide a defense for the discharge where, as here, the record establishes that the misconduct did not in fact occur and that the avowed belief was, in any event, mistaken. See *N.L.R.B.* v. *Burnup & Sims*, 379 U.S. 21, 23.

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[14] Clearly, action of this sort is well within the protection of the Act and an employee discharged for engaging in it is entitled to reinstatement with all rights restored. Cf., *N.L.R.B.* v. *Morrison Cafeteria Co.*, 311 F. 2d 534, 538 (C.A. 8); *N.L.R.B.* v. *Wichita Television Corp.*, 277 F. 2d 579, 584-585 (C.A. 10), cert. denied, 364 U.S. 871; *N.L.R.B.* v. *Coal Creek Co.*, 204 F. 2d 579, 581 (C.A. 10); *Republic Steel Corp.* v. *N.L.R.B.*, 107 F. 2d 472, 479-480 (C.A. 3).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a decree should issue denying the petition to review and enforcing the Board's order in full.[15]

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

SOLOMON I. HIRSH,
MARION GRIFFIN,
Attorneys,

National Labor Relations Board.

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[15] No independent issue of significance is presented by that portion of the Board's decision and order finding that the denial of reinstatement to 19 of the strikers constituted a violation of Section 8(a)(3) and (1) of the Act, and directing a remedy therefor. It is well settled that if the discharge of Olvera was unlawfully motivated, the employees who struck to protest the Company's action were unfair labor practice strikers entitled to full reinstatement on their unconditional applications for work. See *Mastro Plastics* v. *N.L.R.B.*, 350 U.S. 270, 278; *N.L.R.B.* v. *West Coast Casket Co., Inc.*, 205 F. 2d 905, 907-908 (C.A. 9); *N.L.R.B.* v. *Giustina Bros. Lumber Co.*, 253 F. 2d 371, 373-374 (C.A. 9). Contrary to the Company's intimation (Br. 28), the strikers' status as unfair labor practice strikers depends, not on the Union's belief about that status, but on the propriety of the Board's finding that the company action the employees struck to protest was an unfair labor practice, *supra*, p. 25, n. 11 (R. 27, n. 12). The Company's additional suggestion that the strike might be unprotected because called without notice (Br. 28) lacks both evidentiary (R. 20; 145, 187, 274-275) and legal support. See *N.L.R.B.* v. *Washington Aluminum Co.*, 370 U.S. 9.

Certificate

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered Brief conforms to all requirements.

Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relations Board

STATUTORY APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*,) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Unfair Labor Practices

Sec. 8(a) It shall be an unfair labor practice for an employer—

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

* * * *

Prevention of Unfair Labor Practices

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Sec. 10(e) The Board shall have power to petition any court of appeals of the United States, . . . within

any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file

in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * *

LIMITATIONS

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Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

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